Rwanda and Yugoslav tribunals

4. Ability of Tribunal to Implement Mandate

On July 10, 1996, in the wake of the new arrest warrants, representatives of the five-nation "contact" group on Bosnia met in London to discuss appropriate action to end the continued power of Karadzic and Mladic since, under the Dayton peace accord, they are supposed to be arrested.[20] On July 14, 1996, the State Department announced that Richard C. Holbrooke, who negotiated the Dayton peace accords, would visit the area to try to appropriate action to enforce the accords.[21] His visit resulted in a formal agreement, whereby Karadzic agreed to relinquish political power immediately.[22]

B. Rwanda and Yugoslav Tribunals: Improving Legislation on Cooperation[#]

by André Klip[*]

1. Twelve States Willing to Enforce Sentences of the International Tribunal for the Former Yugoslavia, None for Rwanda

In accordance with Article 27 of the Statute of the Yugoslav Tribunal imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated their willingness to accept convicted persons. As of July 3, 1996, twelve states have done so: Bosnia and Herzegovina, Croatia, Denmark, Finland, Germany, Iran, the Netherlands, Norway, Pakistan, Sweden, and Switzerland. Unlike all other forms of cooperation states are under no obligation to cooperate with the Tribunals in the enforcement and execution of sentences. Voluntary cooperation allows states to make their willingness to cooperate conditional. For instance, the state can choose to accept only nationals, or a convicted person only after the state knows his identity.

To date no state has volunteered to enforce sentences imposed by the Rwanda Tribunal. Without a possibility to enforce, no person can be sentenced to imprisonment by that Tribunal.

The conditions under which states have declared their willingness have not become public yet. This is a deplorable situation. Due to the fact that the Tribunal designates the country to serve the sentence, the prison regime of that specific country constitutes a part of the penalty. A ten year prison term in Iran is not the same penalty as a ten year prison term in Norway. It should therefore be possible for the convicted person to lobby a country to serve the penalty including the length of incarceration. In Rule 101 of the Rules of Procedure and Evidence the country in which the sentence will be executed should be taken into account in determining the sentence.

2. New Rule 40BIS of the Rules of Civil Procedure and Evidence

During their tenth Plenary Session, on April 22 and 23, 1996, the Judges adopted a new Rule 40BIS which

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[20] Youssef M. Ibrahim, *5 Nations Discuss Steps to Oust Indicted Bosnian Serb Leaders*, N.Y. TIMES, July 11, 1996, at A3, col. 3.

[21] Michael Dobbs, *Holbrooke to Return to Balkans to Push Removal of War Criminals*, WASH. POST, July 1, 1996, at A16, col. 1.

[22] Perlez, *supra* note 2.

[#] *See* for legislation of other countries, André Klip, *International Criminal Tribunal Yugoslavia Legislation Enacted by Ten Different Nations on Judicial Assistance to the International Criminal Tribunal*, 11 INT'L ENFORCEMENT L.REP. 329-332 (Aug. 1995); and *Judicial Assistance to the Rwandan and Yugoslav War Crimes Tribunals: Guidelines and Implementing Legislation*, 12 INT'L ENFORCEMENT L.REP. 109-112 (Mar 1996).

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provides for a system of provisional detention of suspects transferred to the Tribunal's Detention Unit.[11] This Rule serves the investigation of the Prosecutor and allows the detention of a suspect provisionally and the transfer of that person before indictment. The order will be issued by a Judge when certain conditions are met: (1) the Prosecutor has requested a State to arrest a suspect provisionally, or the suspect is otherwise detained by State authorities; (2) the judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction; and (3) the Judge considers provisional detention to be a necessary measure to prevent the escape of the suspect, injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation. The provisional detention of a suspect shall be ordered for a period not exceeding 30 days. The detention may be extended twice.

The adoption of the new Rule 40BIS raises questions about the accessibility for the public of the Rules of Procedure. It was published in the Bulletin of the Tribunal without information on the date it entered into force. Since the first Rules of Procedure were adopted, on February 11, 1994, the Rules of Procedure of Evidence have been amended on various occasions. Some amendments have become public by issuing new copies of the Rules, others were published in the Bulletin. It is time to adopt a Rule that stipulates that all amendments to the Rules shall be published in a specific bulletin. It is a necessary requirement for every criminal court that both cooperating state authorities as well as individual persons (suspects, accused, witnesses, experts) involved have access to the law. To date, the Tribunal does not fulfil this requirement.

3. *Implementing Legislation*

Belgium -- Wet betreffende de erkenning van en de samenwerking met het Internationaal Tribunaal voor voormalig Joegoslavië en het Internationaal Tribunaal voor Ruanda/Loi relative à la reconnaissance du Tribunal international pour l'ex-Yougoslavie et du Tribunal international pour le Rwanda, et à la coopération avec ces Tribunaux, of March 22, 1996, published in Belgisch Staatsblad, April 27, 1996. Entered into force on April 27, 1996. (Act concerning the recognition of and the cooperation with the International Tribunal for the former Yugoslavia and the International Tribunal for Rwanda.)

On January 9, 1996, the Belgium Government submitted draft legislation on cooperation with the International Tribunals for the Former Yugoslavia and Rwanda. The Explanatory Memorandum states that the act serves to meet Belgium's international obligations under United Nations Security Council Resolutions 827 (1993) and 955 (1994). Where possible, traditional principles of judicial cooperation apply for the assistance to the Tribunals. Article 2 stipulates a general obligation for Belgian authorities to assist the Tribunals by all possible means in proceedings concerning the crimes for which the Tribunals are competent.

Article 6 reflects the primacy of the Tribunals over Belgian national courts. A deferral is not just a hypothetical situation. Being the former colonial power in Rwanda, there are strong ties between the two countries. Article 7 contains a temporary suspension of proceedings in Belgium. A very useful, but also rare provision is Article 8, which enables a Belgium court to reopen suspended proceedings after the Tribunal did not confirm the indictment, declared itself incompetent or when the Prosecutor eventually did not indict the person. The same conditions apply to collecting evidence as to assistance to foreign authorities. Article 14 deals with the enforcement of sentences in case Belgium declares its willingness to execute sentences imposed by the Tribunals.

The draft was criticized by the Belgian Council of State because it did not clearly recognize the competence of the Tribunals but required legislation to that extent. An amendment that expressed this recognition was accepted. The Belgian legislation is of actual importance due to four proceedings currently pending before Belgian courts to atrocities committed in Rwanda. The Rwanda Tribunal requested the deferral with regard to proceedings against three persons on January 11, 1996.

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[11] The new Rule 40 BIS was published in the ICTY-bulletin No. 7 of June 21, 1996.

The deliberations in the Belgian House of Representatives and the Senate show a very active and critical attitude of the members of parliament. The legal relevance of some of the questions asked by members of the two houses is remarkable. In answering one of such questions the Minister of Justice stated that a decision of either of the two Tribunals brings about a *non bis in idem* force concerning the facts.

In the Senate an amendment to prohibit deferral of cases of Belgian nationals was proposed. However, because this would deny the competence of the International Tribunals to try Belgian nationals, it was withdrawn. In another proposal, it was suggested to include an obligation to inform the Tribunal when proceedings before a national criminal court were pending that concern serious violations of international humanitarian law (Article 11). It was also proposed that the transfer of a suspect to the Tribunal could only take place in accordance with the European Convention on Human Rights (Article 13).

Another important legal issue concerned pardon. Under Belgium constitutional law, pardon is a prerogative of the king. Asking a Tribunal permission in cases of pardoning therefore violates constitutional provisions. In the Senate the establishment of the two *ad hoc* Tribunals was regarded as the first step towards the establishment of a permanent international criminal court.

In Article 9 the legislator took the view that the Statutes of the Tribunals do not oblige Belgium to collect evidence in a way that is not provided for under domestic law, for instance the taking of human material. In the discussions in parliament, use was made of several acts of other national agencies (especially in France and Germany), the two Statutes, and the Rules of Procedure and Evidence, as well as numerous articles from legal journals. However, even in the discussions on the question whether the Tribunals were established lawfully, the decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia itself of October 2, 1995 confirming the lawful establishment of the Tribunal and the legality of the powers of the Security Council was not put forward. The Act now specifically recognizes the competence and establishment of the Tribunals.

The high level of the discussions in parliament is astonishing. Taking the primacy of the Tribunals as a starting point, various situations were discussed in which the right to prosecute could return to Belgium again. This shows a willingness of the Belgian legislator to prosecute serious violations of international humanitarian law before national courts. The Belgian legislator took to the view that the right to prosecute returns to Belgium in three cases: the Prosecutor does not indict, the indictment is not confirmed by the Trial Chamber, and the Tribunal declares itself incompetent (Article 8).

Much attention was dedicated to the question whether the arrest procedures were in accordance with the European Convention on Human Rights. One member of the Senate also put into doubt whether it was in compliance with Article 3 of that Convention (torture prohibition) to send someone to a prison in Rwanda to serve his sentence. In the eyes of this Senator the present criminal justice system in Rwanda does not offer the safeguards that human rights will be respected. He referred to a decision of the European Court of Human Rights in the case of *Soering v. United Kingdom* (7 July 1989, Publications of the European Court of Human Rights, series A-161). In *Soering* the European Court of Human Rights held that extradition to the United States, where the applicant ran the risk of spending many years on death row, constituted a real risk to inhuman and degrading treatment as meant in Article 3 of the Convention. The Court therefore ordered the United Kingdom not to extradite Soering to the United States.

The Belgian Minister of Justice declared the general willingness of Belgium to execute sentences imposed by the Tribunals, but also said that he will take up negotiations with the Tribunal in cases of convictions against Belgian nationals. In those cases the enforcement of sentences against Belgians should take place in Belgium.

Austria -- Bundesgesetz über die Zusammenarbeit mit den Internationale Gerichten. Entered into force on June 1, 1996. (Federal Act on the Cooperation with International Tribunals.)

Section 2 contains the general obligation for Austrian authorities to cooperate with both the Yugoslav and the Rwanda Tribunal in the way prescribed by the Extradition and Mutual Legal Assistant Act and the Code of Criminal Procedure. Section 3 describes the competence of the Tribunals. Section 4 deals with the concurrent jurisdiction of Austrian criminal courts, which is not excluded by the existence of the international tribunals. Like the Belgian act, the Austrian act suspends the jurisdiction of a local court during a deferral procedure. The power to prosecute can revive again in cases where the Tribunal did not confirm the indictment, declared itself incompetent or when the Prosecutor eventually did not indict the person (paragraph 4 of section 4). Section 5 allows to extradite Austrian nationals. Section 8 gives a safe conduct under Austrian law during transit in Austria to those who have been summoned from abroad by the Tribunal. The safe conduct is lifted as soon as the Tribunal requires the provisional arrest or orders the transfer of such a person (paragraph 3 of Section 8).

Section 9 provides for the interrogation of suspects and witnesses in Austria by the International Tribunal (self help), as well as for other forms of investigation and collection of evidence. However, the Tribunal may not order or threaten with forms of coercion against persons. Coercion can take place only after a written request for judicial assistance and by Austrian authorities and according to Austrian law. Section 10 deals with the judicial assistance given by Austrian authorities, which will take place according to national standards. Specific evidentiary forms may be applied provided that they do not contravene Austrian law.

Like the Swiss law Section 11 of the Austrian act provides for a summons to be sent directly by the Tribunal by mail, without any involvement of the Austrian authorities. Sections 14-18 deal with the provisional arrest and the transfer of suspects. There seems to be an error in paragraph 2 of section 17 which deals with the practical arrangements concerning the surrender of the suspect. The paragraph provides for communications with the Tribunal and Netherlands' authorities only. This seems to overlook the existence of the Rwanda Tribunal.

Section 19 points at the relevance of the conditions under which States are willing to enforce sentences. The last sentence of this provision states that the Austrian declaration to accept the enforcement of sentences of the Tribunal may be limited in time, number and character (*Art der zu übernehmenden Personen*) of the convicted persons. Section 21 contains the rule of speciality, known from extradition law. It stipulates that after the execution of the sentence, Austria may not prosecute or detain the convicted person for other crimes for which Austrian courts are competent. The analogical application of a rule established in extradition law is rather strange. There is no extradition in this case, but a transfer of execution of a sentence only. In extradition law the protection of the rule of speciality can be lifted by the requested state. In this situation it can be lifted by the International Tribunal ordering the execution of the sentence. It will lead to situations in which the Tribunal will permit prosecutions for offences for which it has no competence itself. A Tribunal has no competence to decide on matters which for instance concern regular bank robberies and drug offenses. It therefore is also not in a position to permit prosecution for such offenses. The rule of speciality can only be applied in the way provided in the Austrian law for offenses for which the International Tribunal is competent and for which there is thus concurrent jurisdiction.

Section 24 deals with the transfer of execution of judgements to a third state. Applications shall be directed towards the International Tribunal. This type of international cooperation corresponds with the Council of Europe Convention on the Transfer of Sentenced Persons (March 21, 1983) which allows the convicted person to initiate a request for a transfer to another state to serve the sentence. Section 26 forms an interesting provision. It determines that any findings as to the facts determined by the Tribunal shall be binding in any civil damage proceedings against the convicted person.